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IN THE

Supreme Court of the United States

October Term, 1946

No. 3

GATH P. FREEMAN, Trustee under the Will and of the Estate of Henry C. Starr, Deceased,

Appellant,

vs.

GILBERT K. HEWITT, Director of Gross Income Tax Division, Department of Treasury, State of Indiana,

Appellee.

APPELLANT'S BRIEF ON QUESTIONS PROPOUNDED FOR REARGUMENT OF CAUSE

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GILBERT K. HEWITT, Director of Gross Income Tax Division, Department of Treasury, State of Indiana,

Appellee.

APPELLANT'S BRIEF ON QUESTIONS PROPOUNDED FOR REARGUMENT OF CAUSE

The appellant[1] is the trustee of the estate of Henry C. Starr, deceased (R. 17). Both Henry C. Starr and appellant were residents of Wayne County, Indiana (R. 17). During the year

1. Appellant was originally Gath P. Freeman, as trustee under the will of Henry C. Starr, deceased. On June 4, 1946, he died. Under the will of Henry C. Starr, Almira G. Freeman, the widow of Gath P. Freeman, was named successor trustee. On July 20, 1946, the succession of the widow to the trust was approved by the Circuit Court of Wayne County, Indiana. A motion for substitution has been presented.

1940 appellant sold certain corporate stocks and bonds belonging to the estate (R. 18-19). Under protest appellant reported to appellee as a part of his gross receipts as trustee the total sale price of $65,214.20 received for the stocks and bonds and paid in 1941 a tax at the rate of one per cent, or $652.14 (R. 18). The tax was levied under The Indiana Gross Income Tax Act of 1933 (R. 3). Appellant took all of the steps required to claim a refund which was denied (R. 21).

A suit was instituted against appellee to recover the tax in the Circuit Court of Wayne County, Indiana, upon the ground that the receipts taxed were from business conducted in commerce between the states and that the tax constituted a regulation of and burden on such commerce in violation of Section 8, Article I of the Constitution of the United States (R. 2-6). After answer and trial, judgment for the full amount of the tax was entered on March 26, 1943, in favor of appellant (R. 9-10). Appellee's motion for a new trial was overruled (R. 10-11) and appellee took an appeal to the Supreme Court of Indiana (R. 24). On October 25, 1943, that court reversed the judgment (R. 30-35). A rehearing was denied (R. 36-39). An appeal was taken to this court (R. 39-40). Probably jurisdiction was noted April 3, 1944 (R. 46).

The stocks and bonds, the receipts from the sale of which were taxed, were sold by appellant on sale orders placed with a broker operating a place of business in Richmond, Indiana (R. 19). The broker's office was the usual one maintaining a board and leasing wires to the Chicago and New York exchanges for constant daily market information (R. 19). The Richmond broker had a direct wire to a brokerage office in New York City (R. 20). The New York broker was a member of the New York Stock Exchange (R. 20). When trustee placed the sell orders he "knew and intended" that the Richmond broker would immediately communicate with the New York broker over the leased wire and that the New York

broker would immediately offer the stocks or bonds for sale on the New York Stock Exchange (R. 20). This course was followed (R. 20). Upon confirmation of the sale by wire from the New York broker to the Richmond broker and notification to appellant, appellant delivered the stocks or bonds to the Richmond broker (R. 20). By him they were mailed to the New York broker who delivered them in New York to the broker there representing the purchaser, who in turn delivered them to the purchaser (R. 20). The purchaser in each instance lived in a state other than Indiana (R. 20-21). A check for the sales price less commission, cost of revenue stamps, postage, and "other expenses of sale" was delivered by mail to the Richmond broker, who, after deducting his commission, delivered the balance to appellant (R. 20).

The cause was briefed and argued here.

On October 8, 1945, this cause was assigned for reargument, and counsel were requested to address themselves in their briefs and on oral argument to three questions. The questions and appellant's position are:

1. *Were the sales of securities as made in the circumstances of this case, including the transactions upon the New York Stock Exchange, interstate sales within the meaning and application of Adams Mfg. Co. v. Storen,* 304 U. S. 307; cf. *McGoldrick v. Berwind-White Coal Mining Co.,* 309 U. S. 33, 58?

Appellant answers—yes. (Argument on this question, pages 7 to 10 infra.)

2. *Does the commerce clause forbid Indiana to levy a gross receipt tax upon the transactions in question, in the absence of any showing that a similar or substantial tax is, or may be, in fact laid upon them by any other state?*

Appellant answers—yes. (Argument on this question, pages 10 to 18 infra.)

3. *To what extent, if any, is Indiana's power to tax the gross receipts from these transactions affected, under the commerce clause, by the facts that domicile of the seller or situs of the securities prior to conclusion of the sales was in Indiana?*

Appellant answers—to no extent. (Argument on this question, pages 18 to 22 infra.)

The Basis of the Tax

The Indiana gross income tax unlike any other tax in any other state is simply a tax upon gross receipts. It is not a tax upon a privilege measured by gross income. It is not a sales tax. It is what it says it is—a tax upon gross receipts.

In the appellee's original brief the attorney-general argued that the tax was "a tax upon residence based upon the privilege of domicile" (Pages 6-8, Brief for Appellee). We do not believe that the attorney-general will now take this position for the reason that since the filing of appellee's brief the character of the act has been officially determined.[2] Under the regulations of the Gross Income Tax Division of the Department of Treasury, adopted with the approval of the attorney-general, there is no doubt now as to the state's interpretation of the act.[3] The regulations, which were adopted accept the

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2. By Chapter 120 of the Acts of the Indiana General Assembly of 1945, effective March 3, 1945, all agencies of the state having power to make rules and regulations, which included the Department of Treasury, were required to follow certain procedures in establishing rules and regulations. All regulations previously adopted were made void. The act required preparation of the rules and regulations by the agency involved, a public hearing after publication of notice in a newspaper published in the city in which the capitol of the state is located, and approval of the regulations by the attorney-general and the governor.

3. Pursuant to the statute set forth in footnote 2 supra, rules and regulations were prepared by the Indiana Gross Income Tax Division of the Department of Treasury. A public hearing was held on these regulations April 8, 1946. The regulations were approved by the attorney-general and the governor and became effective April 27, 1946. The Gross Income Tax Act in section 29

interpretation of this court that the gross income tax "is what it purports to be—*a tax upon gross receipts from commerce.*" The court may now disregard all argument of the attorney-general predicated upon the proposition that the tax is a tax on the privilege of domicile, or any other privilege, measured by gross income.[4]

(3. Continued)
(Chapter 117 of the Acts of the Indiana General Assembly of 1937) authorized the Department of Treasury to promulgate rules and regulations under the act. The regulations, effective April 27, 1946, for the first time defined the type of the tax as follows:

"*TYPE OF TAX. The Indiana Gross Income Tax is, in reality, a gross receipts tax.* The coverage is the widest possible since the entire amount of gross receipts of taxpayers is used as a base. It is not a sales tax even though it applies to receipts from sales. It is not, however, imposed upon the act of sale but upon the receipts from sales when such income is received or credited. It is not an occupation tax because it is applied to every individual, group or firm without regard to the occupation thereof."

"It is not a consumer's tax because the act has no provision for passing the tax on as a separate chargeable item nor would such a provision be valid (Opinion of Attorney General of Indiana, August 21, 1934)."

The nature of the tax has been commented upon by the courts as follows:

> "The law is intended to be general and to operate on all residents of the state and all who derive revenue from sources within the state." *Miles v. Department of Treasury of Indiana*, 1935, 209 Ind. 172; 199 N. E. 372.
>
> "*We conclude that the tax is what it purports to be—a tax upon gross receipts from commerce.*" *J. D. Adams Mfg. Co. v. Storen*, 304 U. S. 307. 1946 Gross Income Tax Regulations, page 1.

4. The regulation set forth in 3 above is consistent with decisions of the Supreme Court of the State of Indiana, except for the language in the state court in the *Adams* case which was repudiated by this court on appeal. See also *Department of Treasury v. Wood Preserving Corp.* (1941), 313 U. S. 62, 66, where in referring to the *Adams* case the court said:

"That was a case under the same taxing act of Indiana, but there the tax was applied to gross receipts derived by an Indiana

The attorney-general has occasionally made the argument in cases involving the gross income tax that the tax was in fact in lieu of property taxes. Of course, there is no foundation for this either in the act or in fact. The tax was imposed as an additional tax. It was not a part of any program for the reduction of property taxes, nor has it resulted in the reduction of taxes on real property.[5]

(4. Continued)

corporation from sales in other States of goods manufactured in Indiana. We observed that the tax is not an excise for the privilege of domicile 'since it is levied upon the gross income of nonresidents from sources within the State.' The point of the decision was that 'the tax is what it purports to be,—a tax upon gross receipts from commerce,' and that the tax was there laid upon receipts from sales to customers in other States and abroad which constituted interstate and foreign commerce."

There is no holding in the Indiana Supreme Court that the tax is based on domicile. In fact the holding in *Miles v. Department of Treasury* (1935), 209 Ind. 172, quoted in the regulations, and in *Department of Treasury v. Crowder* (1938), 214 Ind. 252, overruled on the specific point, but the definition as to the type of tax not repudiated by the court, and in the *Department of Treasury v. Allied Mills* (1942), 220 Ind. 340, and *Department of Treasury v. International Harvester* (1943), 221 Ind. 416, cases are all consistent with the definition of this court in the *Adams* and *Wood Preserving* cases. The latter two decisions rely upon the *Adams* decision.

5. The figures taken from the annual Year Books and Statistical Reports of Indiana demonstrate that the property taxes in the state were not reduced by the enactment of the Gross Income Tax Law. The first full year that the law was in force was 1934. The first column of figures represent the total property taxes collected by all units of government in the State of Indiana from 1934 to 1945. The total intangible taxes collected in the same years is set forth

ARGUMENT

Question 1

THE SALES WERE INTERSTATE IN CHARACTER

The sales of securities involved were negotiated by telegraphic exchange between Indiana and New York. The sales were completed by delivery of the securities by mail from Indiana to New York and return by mail from New York of the check in payment. It was incumbent upon the New York broker for the purchaser to complete delivery to purchasers who resided in all cases in a state other than Indiana and to recover from the purchasers the sale price.

(5. Continued)

in the second column. The total gross income taxes collected in the same years is set forth in the third column. The fourth column is the closing cash balances of the state for the same years.

	Property Tax Collections	Intangible Tax Collections	Gross Income Tax Collections	Closing Cash Balances
1934	$87,437,220.88	$1,284,360.66	$10,392,791.94	$21,963,751.64
1935	95,575,961.18	1,085,909.38	13,642,911.17	27,262,355.56
1936	93,145,960.32	1,326,839.72	16,625,661.55	37,141,462.11
1937	99,688,926.18	1,507,432.87	20,699,646.10	47,544,763.48
1938	98,309,512.97	1,356,879.39	22,421,907.55	48,083,659.27
1939	99,473,099.05	1,252,216.28	20,146,766.06	49,888,457.78
1940	100,303,087.36	1,337,824.94	23,648,497.28	44,083,629.97
1941	105,421,704.10	1,535,034.47	26,054,478.48	48,109,463.23
1942	107,145,956.02	1,899,331.14	33,739,322.56	58,108,741.29
1943	108,729,685.30	1,496,981.30	34,236,158.53	69,610,571.57
1944	104,162,100.08	1,405,090.55	40,838,398.04	78,811,081.41
1945	111,079,966.40	1,482,728.58	46,331,680.86	90,719,200.29

If tangible rather than intangible property was involved there could be no question about the interstate character of the transactions. Recent decisions of this court would seem to foreclose any distinction based solely upon nature of the property. In *United States v. Southeastern Underwriters Ass'n.* (1944), 322 U. S. 533, an indictment of insurance companies for a conspiracy under the Sherman Act was sustained because transactions of such companies across state lines were held to be commerce within the meaning of the clause in the Constitution. In meeting the argument that *Paul v. Virginia* (1869), 8 Wall. (U. S.) 168, held that insurance policies were "not commodities to be shipped or forwarded from one State to another," this court declared, . . . both before and since *Paul v. Virginia* this Court has held that Congress can regulate traffic though it consists of intangibles" (322 U. S. 546).

In *Prudential Insurance Co. v. Benjamin* (1946) —— U. S. ——, this court upheld a South Carolina tax charged to be a discriminatory one against the interstate commerce of insurance not because the business of insurance was not such commerce, nor because discriminatory taxes against commerce were valid, but because an act of Congress (the McCarran Act) gave authority to the states to regulate and tax the commerce of insurance. Cf. *Robertson v. People of State of California* (1946), —— U. S. ——.

These cases and the cases cited in the South-Eastern case[6] establish the proposition that commerce comprehends traffic

6. *Gibbons v. Ogden* (1824), 9 Wheat. (U. S.) 1, 189, 190, 229, 230; *Pensacola Teleg. Co. v. Western U. Teleg. Co.* (1878), 96 U. S. 1; Lottery Case (*Champion v. Ames*) (1903), 188 U. S. 321; *Jordan v. Tashiro* (1928), 278 U. S. 123, 127, 128; *Electric Bond & Share Co. v. Securities & Exchange Commission* (1938), 303 U. S. 419, 432, 433; and *American Medical Association v. United States* (1943), 317 U. S. 519

between states in intangibles as well as like traffic in tangible property.

The transactions upon the New York Stock Exchange in this case only adds emphasis to the interstate character of the commerce. In total such transactions have been declared by Congress to "constitute an important part of the current of interstate commerce."[7] Regulation under acts of Congress of such commerce is now settled beyond doubt.[8]

On any realistic or logical basis it is impossible to conceive that typical transactions across state lines which give character to the whole current of commerce are not also interstate commerce. Whether the legalistic concepts of situs and domicile have any application in this case is discussed under the third question propounded. (Infra pages 18 to 22.) However, at this point it may be observed that such legal fictions do not alter the practical or factual status of the business. It is this aspect of the matter which is the particular concern of the court in commerce cases.[9] Upon such an approach it must be agreed that we have here a case of interstate sales differing from the Adams case[10] only as to the nature of the goods. One involves intangible property; the other, tangible property. Legally the distinction is as imma-

7. Securities Exchange Act of 1934, U. S. C. A. Title 15, Section 78b(1)(b). As an analogous situation in the case tangible property compare stockyard and elevator cases. *Stafford v. Wallace* (1922), 258 U. S. 495, 518-519.

8. *Electric Bond & Share Co. v. Securities & Exchange Commission* (1938), 303 U. S. 419; *Smolowe v. Delendo Corp.* (2CCA, 1943), 136 F. (2d) 231, 240, cd 320 U. S. 751; *Wright v. Securities & Exchange Commission* (1940 2CCA), 112 F. (2d) 89, 94; *Securities & Exchange Commission v. Torr* (1936, D.C.S.D.N.Y.), 15 F. Supp. 315, 320.

9. On the practical aspects of the application of a state tax to commerce compare the analysis in Lockhart's "Gross Receipts Taxes on Interstate Transportation and Communication." (1943) 57 Harvard Law Review 40.

10. 304 U. S. 307 (1938).

terial as one between roadgraders and apples when a tax on commerce is in question.

Question 2

The Commerce Clause Forbids the Levy in Question

The discussion of this question may begin with two matters which are clearly beyond argument; first, this case involves a gross receipts tax upon commerce, baldly just that with no deviation into the field of taxes upon an occupation, or a privilege, or a sale[11]; second, the gross receipts taxes are from transactions in commerce.[12] Whether this is such a tax upon commerce as is condemned by the commerce clause is therefore the only question. We believe the tax should be condemned upon two points under the decisions of this court.

ONE. It operates discriminatorily against commerce, placing such commerce at a competitive disadvantage.

TWO. It is such a tax as may be multiplied by every state which the commerce touches.

That a similar or substantial tax is, or may be, in fact laid upon such commerce is unimportant if the tax in fact operates discriminatorily. That a similar or substantial tax may be levied upon such commerce is enough upon the latter point because surely the right of one state to tax cannot be made to turn upon the chance of whether another state has chosen to tax. Any such a limitation of the *Adams*[13] and *Gwin, White & Prince*[14] cases is not required by subsequent decisions of this court is inconsistent with the spirit and purpose of the commerce clause and would lead to curious results creating great confusion. A tax, for example, by Indiana, valid today

11. See footnote 3, page 4 supra.
12. See pages 7 to 10 supra.
13. 304 U. S. 307 (1938).
14. *Gwin, White & Prince v. Henneford* (1939), 305 U. S. 434.

on commerce moving into New Jersey — because New Jersey has no similar or substantial tax might become invalid tomorrow, not by any act of Indiana, or any change of the laws of Indiana, but because New Jersey later levied a "similar or substantial" tax.

What a "similar" tax would be, the taxpayer would have to determine at his peril. Of course, a gross income tax like Indiana's would be a similar tax—but would a sales tax, a use tax, a compensating tax, an occupation tax measured by gross receipts, a license tax for the privilege of selling with the fee based on gross receipts, or any other tax where gross receipts was the measure of the tax, be a similar tax? Forecasting now the taxes which the ingenuity of state officials may invent is, to say the least, difficult. Defining now the character of similar taxes would be a no less difficult task.

Again at his peril the taxpayer would have to determine whether the tax in the other state was substantial. Is there any standard to which resort may be had for this determination? Would one-tenth of one per cent of the gross receipts be substantial? If not, would five per cent? And if the latter is substantial and the former is not, at what point between does the tax become substantial enough to oust Indiana's right to tax? In the process does New Jersey also lose the right to tax? And, at what point?

If such a rule were announced it would not only unsettle the law,[15] but it would introduce a standard so uncertain that

15. Since the decision of this court in *McGoldrick v. Berwind-White Coal Mining Co.* (1940), 309 U. S. 33, and the other decisions following it, a committee of the National Association of Tax Administration after a great deal of study proposed a Uniform Regulation for all states having sales and gross receipts taxes. The purpose of the regulation was (1) to secure laws and regulations which could be "easily and efficiently administered"; and (2) to make it easier for taxpayers engaged in business in more than one state to comply with the laws of the several states. The regulation applying to tangible personal property set up as taxable, sales in the state

legislators, state tax officials, taxpayers and courts would have so much latitude for disagreement that nearly every question would have to be litigated to final decision by this court. What is similar and what is substantial are questions of fact where no jury can act to put the question at least partially at rest as where, for example, the issue of negligence is determined on the basis of whether defendant exercised reasonable care.

Apart from the chaos and confusion that such a rule would create in this field, the rule alone would add a burden to every taxpayer doing business in more than one state. A company such as the one in the *Adams* case doing business in every state would have to set up accounting systems to segregate

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(15. Continued)

of delivery where the seller was engaging in business in such state and as nontaxable sales in the state of the seller where the seller was obligated to deliver to a point outside of the state. (Paragraph 1-295 Interstate Sales Tax Service, Commerce Clearing House.) This regulation has been adopted by various states. (See Paragraph 1-300 Interstate Sales Tax Service, Commerce Clearing House.)

Cf. the declaration of the Supreme Court of Indiana, where after reviewing the *Adams*, *Western Livestock*, and *Gwin, White & Prince, Inc.*, cases the court declared:

"We are not presently confronted with the problem of multiple taxation since it must be concluded, on the authority of the cases cited, that the State of Illinois could not impose such a tax on the appellee's income from sales in Indiana. The question is, rather, whether the incidental interstate nature of the appellee's business entitles it to be exempted from all state taxes of this character.

"The trend of the recent decisions appear to support the view that under the circumstances of the case before us the imposition of a tax of this character by the buyer's state will be sustained. *Wiloil Corp. v. Pennsylvania* (1935), 294 U. S. 169, Rehearing denied, 294 U. S. 733, 55 S. Ct. 358, 79 L. ed. 838. *Henneford v. Silas Mason Co.* (1937), 300 U. S. 577, 57 S. Ct. 524, 81 L. ed. 814. *Matter of Sears Roebuck & Co. v. McGoldrick* (1938), 279 N. Y. 184, 280 N. Y. 570, 18 N. E. (2d) 25. 'The Sales Tax in Interstate Commerce' (1939), 52 Harvard Law Review 617. 'State Sales Taxes: The Supreme Court and the Commerce Clause' (1940), 26 Va. Law Review 1030. Such will be the conclusion of this court until the matter is finally put at rest by the Supreme Court of the United States." *Department of Treasury v. Allied Mills, Inc.* (1942), 220 Ind. 340, 342-343.

sales into each of the states. Then after sorting out all sales exempt from a tax in any state it would have to further separate those taxed elsewhere between those where a "similar or substantial" tax was paid and those where there was no "similar or substantial" tax. The returns to the state would have to reflect this situation. This burden alone would be a heavy one upon interstate commerce not borne by local commerce.

We do not believe that the commerce clause calls for any such a precedent shattering determination in this case. Such a decision would require a complete reorientation by tax officials and taxpayers alike at a time when a workable basis is being arrived at under court decisions.[16]

A. *This Tax Operates Discriminatorily.*

The tax as sought to be applied in this case in the state of the seller or origin of the commerce puts the interstate seller at a competitive disadvantage to the extent of the tax.[17] This

16. The uniform regulation referred to in note 15 above has been adopted in substance either in the law or regulations in the following states having sales taxes: Alabama, Arkansas, California, Colorado, Illinois, Iowa, Kansas, Louisiana, Michigan, Missouri, New York, North Dakota, Ohio, Oklahoma, South Dakota, Utah, Washington, and Wyoming; and in the following states having business and occupation taxes: Washington and West Virginia. North Caroline is the only state having a sales tax where in substance the regulation has not been adopted. What the practice there is on this point is not apparent.

17. If a tax in its practical operation works discriminatorily against commerce it is condemned. This court recently said:

"In passing on the constitutionality of a tax law 'we are concerned only with its *practical operation*, not its definition or the precise form of descriptive words which may be applied to it.'

". . . Prohibited discriminatory burdens on interstate commerce are not to be determined by abstractions."

Nelson v. Sears, Roebuck & Co. (1941), 312 U. S. 359, 363, 366; cf. also *Best & Co. v. Maxwell* (1940), 311 U. S. 454, 457; *Nippert v. Richmond* (1946), 326 U. S. ——; *Gwin, White & Prince v. Henneford* (1938), 305 U. S. 434, 438-439; *McGoldrick v. Berwind-White Coal Mining Co.* (1940), 309 U. S. 33.

is true whether New York does or does not levy an additional similar or substantial tax. In this case appellant was at disadvantage in competition on the New York Stock Exchange by the full amount of the tax, i. e., at $1.00 per $100.00 since the tax was at one per cent of the gross receipts from the sale. A New York owner of similar securities, of course, has that much advantage which is substantial in the case of stocks or bonds. This competitive disadvantage is in nowise alleviated if in New York the Indiana seller pays a tax which the local seller must also pay. The Indiana man goes into the market in any case one point down to the local man.

A "gross receipts tax on commerce" will always work discriminatorily against the interstate seller if the state of the seller or the origin of the commerce can impose the tax.[18] Heretofore it had been supposed that this was the real distinction between the *Adams* and the *Berwind-White* type of case.[19] Thus, if a tax in the state of the buyer or delivery affects all alike, interstate commerce is neither discriminated against nor unduly burdened. Just the reverse is true, even as to a tax levied on all taxpayers without discrimination, in state of origin, because that state cannot reach into the state of the buyer or delivery to equalize the tax burden. In this situation the interstate seller can look only to the commerce clause as interpreted and applied by this court to protect him

18. Of course, where the state of origin and the state of delivery are the same the commerce is local in character and the state may tax even though the buyer may reside outside of the state, and the goods may actually be transported outside of the state before delivery. Cf. *Department of Treasury v. Wood Preserving Corporation* (1941), 313 U. S. 62; *International Harvester Company v. Department of Treasury* (1944), 322 U. S. 340.

19. *Nippert v. Richmond* (1946), 326 U. S. ——; *McGoldrick v. Berwind-White Mining Co.* (1940), 309 U. S. 33, 57-58; *Southern Pacific Co. v. Gallagher* (1939), 306 U. S. 167, 175.

from what in operation will always be a discriminatory situation in other states where he must compete for a market.[20]

Indiana does not go penniless even where a manufacturer does not under the *Adams* case pay on commerce moving out of the state. A taxpayer such as Adams pays on all local sales,[21] on all service transactions,[22] and on all income from investments.[23] In addition the very activity gives rise to another source of income for the state. All the raw materials purchased, whether purchased locally or from outside the state, bear the tax[24] and sums paid out for labor furnished are taxed under the Gross Income Law.[25] These latter taxes to the state of Indiana though paid in the first instance by the supplier and wage earner are a result of the existence of the

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20. The notion that Congress could or would settle the question of the application of state tax laws as applied to commerce is dispelled by a history of more than 150 years of inactivity in the field and by its abdication following the *South-Eastern Underwriters* decision where the application of Federal regulation was made clear. (Cf. 15 U. S. C. A., Section 1011, et seq.) Also compare the remarks of a member of this court in a concurring opinion where it was said:

"It is a tempting escape from a difficult question to pass to Congress the responsibility for continued existence of local restraints and obstructions to national commerce. But these restraints are individually too petty, too diversified, and too local to get the attention of a Congress hard pressed with more urgent matters. The practical result is that in default of action by us they will go on suffocating and retarding and Balkanizing American commerce, trade and industry." *Duckworth v. Arkansas* (1941), 314 U. S. 390, 400.

21. *Miles v. Department of Treasury* (1935), 209 Ind. 172; *Storen v. J. D. Adams Mfg. Co.* (1937), 212 Ind. 343.

22. *Department of Treasury v. Ingram-Richardson Mfg. Co.* (1941), 313 U. S. 252.

23. Cf. *Department of Treasury v. Muessel* (1941), 218 Ind. 250; *Adams Mfg. Co. v. Storen* (1938), 304 U. S. 307.

24. Cf. cases footnote 18 supra, and *Department of Treasury v. Allied Mills* (1940), 220 Ind. 340.

25. Section 1(m), Chapter 50, Acts of Indiana 1933, as amended. Burns' Rev. Stat., Ind., 1933, Section 64-2601.

enterprise. In the final analysis the tax is reflected in the cost to Adams. So commerce, under a gross receipts law like Indiana's, pays its way.

B. *The Gross Receipts Tax May Be Levied By Other States.*

Search for a "taxable event" and seizure upon some local phase of a transaction to sustain the tax is not possible in this case.[26] The tax is upon "gross receipts" received in Indiana

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26. The case of *O'Kane v. State* (1940), 283 N. Y. 439, 28 N. E. (2d) 905, relied on by the Indiana Supreme Court in its opinion in this case is an example of the distinction between a gross income tax like Indiana's and a tax levied on a particular event. In the *O'Kane* case a New York tax levied upon "all sales, or agreements to sell, or memoranda of sales and all deliveries or transfers" of shares of stock at the rate of 3 cents for shares of less than $20 sale price and 4 cents over that figure was upheld. The sales in question involved deliveries outside of New York State while the contract to sell was made and approved within the State. Four of the judges of the court felt that the tax was valid because:

"The taxable event, to-wit, the making of the agreement for the sale of the property, occurred in this State prior to the transportation of the goods in interstate commerce, and was an exercise of one of the incidents of ownership" (28 N. E. (2d) 909).

The statute did name a contract of sale as a taxable event. No such selection is made in the Indiana statute. It is simply a tax on gross receipts from commerce. The New York court distinguished the *Adams* and the *Gwin, White & Prince* cases, saying,

"The taxes there in question were held invalid because the taxable event was equally within the jurisdiction of States other than the one of origin and the one of destination, and hence the same event could have been taxed in each State through which the shipment passed if the levy had been sustained" (28 N. E. (2d) 909).

Three judges of the court dissented on the grounds that the effect of the New York tax was the same as the effect of the tax in the *Adams* case. The *O'Kane* case, if it is instructive at all in this case, demonstrates clearly (1) that the majority of the court was willing to go along because there was the selection of a local taxable event; (2) that the majority of the court felt that a tax such as the Indiana gross income tax could not be sustained; and (3) that the sales in this case of the shares of stock would have to pay in New York another tax, clearly indicating a multiple burden on the shares in question (R. 18-19). At the rate fixed in the New York law under the *O'Kane* decision the New York broker selling the shares would have to pay $140.55 in taxes.

from out of state pursuant to an interstate sale. Indiana has now abandoned all pretext and calls such a tax by its rightful name, a "tax upon gross receipts from commerce."[27] Such a tax is valid in the state of delivery,[28] but if Indiana as the state of origin may levy a "tax on commerce," why not also any other state where there is some incident of the commerce? Thus, if the taxpayer received or deposited the money in some other state could not that state also tax the full gross receipts? Or, why not also the state where a transfer agent might register the stock for transfer? Logically a "tax on commerce" could be applied in any state which offers some protection or sanction to any incident of the commerce.[29] The effect of such a tax is quite different from a tax on the *use* of an article,[30] or on *delivery* pursuant to a sale,[31] in the state of destination of the commerce. Only one state can lay claim to such a taxable incident. But "commerce" in its essence means that more than one state must have some claim to a local incident of the commerce, and a "tax on commerce" is thus capable of levy wherever the commerce touches any state.

Any tax such as Indiana's, when applied to more than use or delivery, opens commerce to multiple burdens. In the long

27. See note 3, page 4 supra.

28. See cases note 18, page 14 supra.

29. "It has not yet been decided that every state tax bearing upon or affecting commerce becomes valid, if only some conceivably or conveniently separable 'local incident' may be found and made the focus of the tax." *Nippert v. Richmond* (1946), 326 U. S. ——.

30. *Monamotor Oil Co. v. Johnson* (1934), 292 U. S. 86; *Southern Pacific Co. v. Gallagher et al.* (1939), 306 U. S. 167; *Felt & Tarrant Co. v. Gallagher et al.* (1939), 306 U. S. 62; *Nelson v. Sears, Roebuck & Co.* (1941), 312 U. S. 359; *Nelson v. Montgomery Ward & Co.* (1941), 312 U. S. 373; *General Trading Co. v. State Tax Commission* (1944), 322 U. S. 335; cf. as to a compensating tax, *Henneford v. Silas Mason Company, Inc.* (1937), 300 U. S. 577.

31. *McGoldrick v. Berwind-White Mining Co.* (1940), 309 U. S. 33.

run the interest of the states is served if one, but only one, state may tax commerce.[32] Commerce is protected from laws discriminatory in operation and from multiple burdens if, and only if, as in the past this court holds to the principal that the one state which may tax is the state of the buyer or delivery. It is only in this state that competitive equality may be maintained and discrimination avoided by a tax upon both local and interstate commerce.

Question 3

Domicile and Situs Have No Effect Upon the Commerce Question

Domicile and business situs are legal concepts of concern in cases involving conflicts between states claiming jurisdiction to tax intangible property. The right to levy property,[33] transfer,[34] and succession taxes[35] has been justified by the applica-

32. The Attorney General argues that to hold that Indiana cannot tax here would concentrate the power to tax such transactions in New York (Appellee's Brief, page 18). But this argument overlooks three things: (1) there are other large markets in Chicago, Detroit, Philadelphia, Pittsburgh, St. Louis, Cleveland, San Francisco, Cincinnati, Boston and Salt Lake City and many other cities, including Indianapolis, have over-the-counter markets; (2) after all it is New York that has jurisdiction to protect the sale because title passes there; (3) Indiana does impose a tax upon all residents for the privilege of selling, assigning or owning intangibles at the rate of twenty-five cents per $100.00 which is collected not only upon each act of transfer but annually upon the owning of such property, Chapter 81, Acts of Indiana 1933, Burns R. S. 1933, Section 64-901, et seq. How substantial the tax on intangibles is appears from footnote 5, page 7 supra.

33. *Fidelity & Columbia Trust Co. v. Louisville* (1917), 245 U. S. 54.

34. Domicile of the owner was held sufficient to give the domiciliary state power to tax a transfer of intangibles though the evidences were kept outside the state. *Central Hanover Bank & Trust Co. v. Kelly* (1943), 319 U. S. 94.

35. The leading case where the whole problem is discussed is *Curry v. McCanless* (1939), 307 U. S. 357; Cf. also *Graves v. Elliott* (1939), 307 U. S. 383.

tion of one or the other of these concepts. Where intangibles have acquired a situs apart from the domicile of the owner, rival claims by the states of domicile and situs are made, and the taxpayer asserts protection under the due process clause.

We are not here troubled by such questions of dual location for tax purposes. The domicile of the owner of the legal title of the securities was in Indiana and so also was the physical location of the evidences of the intangibles, namely, the stock certificates and the bonds, prior to sale. Indiana admittedly had jurisdiction to impose property taxes and in fact did so.[36] No due process question is raised.

So far as we are aware this court has never passed upon the application of the two concepts of situs and domicile to gross receipts taxes or sales taxes upon the gross proceeds from interstate sales. A question is raised on this point under the commerce clause. The due process cases are of no assistance on this point. Here, if appellant is correct that intangibles are subjects of commerce then admittedly more than one state is immediately involved and the question is whether in the interest of the free movement of such commerce any restrictions are to be found in the constitutional grant to Congress to regulate commerce. Situs, domicile, and due process cases provide no key to unlock that problem.[37]

The State Court in sustaining the tax did not discuss the problem but took the position that the situs of the securities remained at the domicile of the owner in Indiana until owner-

36. Cf. notes 5 and 32, pages 7 and 18. The Indiana intangibles tax is a privilege tax levied in lieu of property taxes. *Lutz v. Arnold* (1935), 208 Ind. 480.

37. Cf. the concurring opinion in a situs, domicile, due process case where four members of this court declared:

"Especially important is it to abstain from intervention within the autonomous area of the legislative taxing power where there is no claim of encroachment by the states upon powers granted to the national government." *Newark Fire Insurance v. State Board of Tax Appeals* (1939), 307 U. S. 313, 324.

ship passed to the purchasers and that the activities of the brokers acting for appellant "did not change the situs" of the securities (R. 35). This ignores the facts. *The very essence of each sale was a change of situs of the securities.* This occurred when the ownership in the securities passed to the purchaser. This occurred in New York when the broker there acting for the Richmond broker delivered the securities to the broker acting for the purchaser.[38] It was this delivery which completed the sale and gave rise to the gross receipt taxed. It depended upon a train of events both before and after delivery, all of which involved transactions across state lines—(1) an offer to sell by wire Indiana to New York; (2) an acceptance of the offer New York to Indiana preceded by a purchase order from some state other than Indiana to New York; (3) delivery of the securities by mail from Indiana to New York followed by delivery from New York to some state other than Indiana to the purchaser; (4) delivery of checks from New York to Indiana of the purchase price and a check in payment from some state other than Indiana to New York; and (5) all conducted through the media of an exchange which is the vortex of such commerce with all of the states.

If these transactions were not in commerce while the sum of such transactions through an exchange are clearly commerce then meaning of that word is as variable as the colors of a chameleon. And there is about as much substance to the

38. It was the passage of title in New York which gave rise to the receipts taxed. Indiana cannot project its power to tax beyond its boundaries and into New York. This court recently declared in a case involving an Arkansas sales tax sought to be applied to goods shipped into the state from Tennessee where title passed in that state that, "We would have to destroy both business and legal notions to deny that under these circumstances the sale—the transfer of ownership—was made in Tennessee. For Arkansas to impose a tax on such transaction would be to project its powers beyond its boundaries and to tax an interstate transaction." *McLeod v. Dilworth Co.* (1944), 322 U. S. 327, 330.

concept of what is commerce as the diet on which the reptile for a long time was believed to live—namely, air.

If the gross receipt which is the thing here taxed did not arise from commerce it is only because the receipt gets its color, chameleon-like, from some part of the picture to which the state would attach it,[39] since the whole picture of the transaction from which the gross receipts arose was clearly interstate in character.

Conclusion

We respectfully submit a *gross receipts tax on commerce* may not be sustained on the sales of intangibles under the circumstances in this case,[40] because the tax has the threat of an undue multiple burden on such commerce and in the fact works discriminatorily against such commerce.

Respectfully submitted,

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39. In a case involving the due process clause this court declared:

"We cannot, however, be too often reminded that the limits on the otherwise autonomous powers of the states are those in the Constitution and not verbal weapons imported into it. 'Taxable event,' 'jurisdiction to tax,' 'business situs,' 'extraterritoriality,' are all compendious ways of implying the impo[illegible] state power because state power has nothing on which to ope[illegible] These tags are not instruments of adjudication but statements of result in applying the sole constitutional test for a case like the present one." *Wisconsin v. J. C. Penney Co.* (1940), 311 U. S. 435, 444. The reverse must also be true. Such tags as situs cannot determine the power of a state to tax commerce.

40. The tax, since it is a tax levied on commerce without apportionment, is of the type traditionally condemned by this court. The

(40. Continued)

point has not been argued in this brief since it was not within the scope of the questions to which the brief was to be addressed. However, the following cases are typical: *Philadelphia & S. M. S. S. Co. v. Pennsylvania* (1887), 122 U. S. 326; *Leloup v. Port of Mobile* (1888), 127 U. S. 640; *Galveston, H. & S. A. R. Co. v. Texas* (1908), 210 U. S. 217; *Meyer v. Wells, Fargo & Co.* (1912), 223 U. S. 298; *Crew Levick Co. v. Pennsylvania* (1917), 245 U. S. 292; *Cudahy Packing Co. v. Minnesota* (1918), 246 U. S. 450; *United States Glue Co. v. Oak Creek* (1918), 247 U. S. 321; *Sprout v. South Bend* (1928), 277 U. S. 163, 171; *New Jersey Bell Tel. Co. v. State Board* (1930), 280 U. S. 338, 349; *Cooney v. Mountain States Tel. & Tel. Co.* (1935), 294 U. S. 384, 392-393; *Matson Navigation Co. v. State Board* (1936), 297 U. S. 441, 444; *Pacific Tel. & Tel. Co. v. Tax Commission* (1936), 297 U. S. 403, 412-413; *Fishers Blend Station v. Tax Commission* (1936), 297 U. S. 650, 655, 656; *Puget Sound Stevedoring Co. v. Tax Commission* (1937), 302 U. S. 90; *Gwin, White & Prince, Inc. v. Henneford* (1939), 305 U. S. 434; *Adams Mfg. Co. v. Storen* (1938), 304 U. S. 307.